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May 14, 2020

VIA ECFHonorable Margo K. Brodie
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201Re: *Federal Defenders of New York, Inc. v. Federal Bureau of Prisons, et al.*, No. 19-cv-00660 (E.D.N.Y.)

Dear Judge Brodie:

I write to update the Court on the parties' ongoing efforts to address several of the important issues raised in this litigation through mediation.

I. Background

Since our May 8, 2020 Telephone Status Conference with the Court, I have spoken with counsel for Federal Defenders, Inc., along with their client representatives and have had a similar separate conversation with counsel for the government and representatives of the Metropolitan Detention Center ("MDC") and

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Metropolitan Correctional Center (“MCC”). I have also spoken with the Wardens of both the MDC and the MCC.¹

This week, my conversations with the Federal Defenders and the Government have focused on the following topics:

1. The execution of the current protocol for scheduling and placing attorney-client phone calls at the MDC and the MCC.
2. Efforts to improve access to videoconferencing equipment at both institutions.
3. Issues surrounding attorney-client communications.
4. The status of in-person legal visits.

Once again, my discussions with the parties have been productive. Each side understands the important issues at stake in this litigation and are working in good faith and under difficult circumstances to address these issues.

My conversations with the Wardens of the MDC and the MCC focused on the status of the current system for providing telephonic and video access for counsel as well as issues concerning the potential reinstatement of in-person counsel visits. In addition, my conversation with the Warden of the MDC included a discussion of staff training and accountability within the current system.

II. Telephonic Contact

This was the fourth week in which the parties scheduled and facilitated legal phone calls under the Court Protocol for Attorney Calls and Teleconference Hearings. Pursuant to the Protocol, attorney-client calls were scheduled by Federal Defenders for afternoon slots of one-half hour each from 12pm to 3pm at the MDC and 1 to 3:30 pm at the MCC.

A. MCC

Based on the institution’s call logs and Federal Defender data, telephonic contact at the MCC went well this week. According to the institution’s log, legal calls scheduled since May 8, 2020 have all been attempted or completed.

¹ With Federal Defenders, Inc.: May 14, 2020; with MCC and MDC: May 14, 2020. I also had separate conversations with each of the Wardens of MCC and MDC on May 14, 2020.

B. MDC

According to the information I have from MDC and Federal Defenders, there were 127 call requests since the last May 8, 2020 Status Conference. 114 of those have been completed, seven were attempted, and five were cancelled or rescheduled at the attorney or inmate's request. At the time of filing we do not have data for one call request.

C. Overflow Calls

Last week we discussed the issue of an overflow of call requests for the 6th floor of the MDC, wherein call requests exceeded the number of available afternoon slots. The parties agreed that Federal Defenders would designate calls that could be less than 30 minutes in length and that could occur during the morning hours. The institution would place those calls during a morning block of 9 a.m. – 12 noon. Utilizing this system, Federal Defenders reports that overflow calls for the 6th floor have been reduced in number to between 1 and 3. Additional floors on the MDC are now experiencing overflow issues to varying degrees. I have proposed that the parties utilize the same system on these additional floors to handle the overflow calls.

Federal Defenders has requested information on the issue of whether calls could be scheduled for the late afternoon/early evening hours, similar to the previous schedule of in person visits. I have spoken with the Wardens of both institutions on this issue. I am advised that staffing issues – specifically the lack of unit staff on duty at those times - preclude coverage of calls in the evenings and on weekends. As previously noted additional staff have been brought on board and are implementing the current system.

D. Training and Accountability

While we did not see issues with lack of privacy this week they were discussed in my call with the Warden of MDC. I am advised that all unit staff have been provided with written guidance on the issues, including the need for privacy, surrounding legal calls. In addition, in person training has reiterated the training and specifically discussed the issue of potential disciplinary action. An additional officer has been placed within the SHU, where many of the privacy issues arose, to oversee legal calls. As noted last week, written guidance has also been posted within the SHU.

III. Videoconferencing

A. MCC

According to MCC's records, there were fifteen videoconferences scheduled to take place this week. Fifteen were completed as scheduled, although I am aware that several calls faced technical difficulties.

B. MDC

According to MDC's records, there were five videoconferences scheduled to take place this week. Four went forward as scheduled. One did not go forward because an inmate declined to participate.

Videoconferencing from the MDC utilizing the new equipment began this week with two videoconferences scheduled for today and two scheduled for Friday May 15. One videoconference experienced technical issues involving sound. The second videoconference was delayed but appears to have proceeded without technical issues.

As discussed last week, the MDC has created a specific email address for counsel to use in the event of technical difficulties with videoconferencing. This email forwards the message to several email inboxes, including the staff of the Computer Services section and the staff of the Legal Department. This will allow a radio message to be sent within the institution to a Computer Services staff member who can provide assistance. The email address has been provided to Federal Defenders, albeit after this afternoon's technical issues.

IV. Communication with Counsel

In a related issue, Federal Defenders advised that they had been apprised of issues at the MDC with legal mail. Incoming mail in general is opened and inspected prior to being provided to an inmate. 28 CFR §§ 540.12, 540.14. Legal mail is considered "special mail," and may be opened only in the presence of the inmate and then inspected only for contraband. In order to qualify for this protection the envelope must be marked with the attorney's name and an indication that the person is an attorney, and the front of the envelope sender must be "marked 'Special Mail – Open only in the presence of the inmate.'" 28 CFR §§ 540.18, 540.19. One inmate asserted that his legal mail had been opened in front of him but then photocopied before being provided to him. Two other inmates asserted that their legal mail was not opened in their presence and they had simply received photocopies.

I raised this issue with the Wardens of both the MDC and MCC. Warden Vitale of the MCC advised me that she had spoken with inmates in the MCC who had raised similar complaints to her. She advised that she asked to see the transmittal envelopes for the materials and observed that they did not have the appropriate designation as legal mail as provided for by regulation. Warden Vitale advised that she plans to provide a sample envelope with the appropriate designations to be posted on the floors for inmates observation.

Without observing the envelopes at issue in the MDC I am not able to ascertain whether the appropriate designations were on them. I have recommended that MDC post similar examples.

V. In Person Visits

Current BOP guidance curtailing in person legal visits is scheduled to expire on May 18, 2020. I have discussed this issue with the Wardens of the MDC and the MCC. Both have advised me that while new guidance has not been issued as of yet they do not anticipate the resumption of in person visits next week. Both Wardens will receive the guidance when issued and formulate a plan of action. The Wardens also agreed to my request to maintain a dialogue on issues and concerns concerning in person visits which could inform their planning process.

I have also had discussions with both parties about various issues and concerns raised by the resumption of in person visits. These discussions will be ongoing and will inform my dialogue with the Wardens.

Respectfully,

/s/ Loretta E. Lynch
Loretta E. Lynch

cc: Sean Hecker, Kaplan, Hecker & Fink
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